STATE OF SOUTH CAROLINA)
)

(Caption of Case)

Petition for Approval of Nextel South Corp. and Petition for Approval of NPCR, Inc. d/b/a Nextel Partners')

Adoption of the Interconnection Agreement Between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS And BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast)

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET NUMBER: 2007 - 255, 256 - C

(Please type or print)
Submitted by: John J. Pringle, Jr.

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DOCKETING INFORMATION (Check all that apply)

☐ **Emergency Relief demanded in petition**

☐ **Request for item to be placed on Commission's Agenda expeditiously**

☐ **Other:**

INDUSTRY (Check one)

- ☐ Electric
- ☐ Electric/Gas
- ☐ Electric/Telecommunications
- ☐ Electric/Water
- ☐ Electric/Water/Telecom.
- ☐ Electric/Water/Sewer
- ☐ Gas
- ☐ Railroad
- ☐ Sewer
- ☒ Telecommunications
- ☐ Transportation
- ☐ Water
- ☐ Water/Sewer
- ☐ Administrative Matter
- ☐ Other:

NATURE OF ACTION (Check all that apply)

- ☐ Affidavit
- ☐ Agreement
- ☐ Answer
- ☐ Appellate Review
- ☐ Application
- ☐ Brief
- ☐ Certificate
- ☐ Comments
- ☐ Complaint
- ☐ Consent Order
- ☐ Discovery
- ☐ Exhibit
- ☐ Expedited Consideration
- ☐ Interconnection Agreement
- ☐ Interconnection Amendment
- ☐ Late-Filed Exhibit
- ☐ Letter
- ☐ Memorandum
- ☐ Motion
- ☐ Objection
- ☐ Petition
- ☐ Petition for Reconsideration
- ☐ Petition for Rulemaking
- ☐ Petition for Rule to Show Cause
- ☐ Petition to Intervene
- ☐ Petition to Intervene Out of Time
- ☐ Prefiled Testimony
- ☐ Promotion
- ☒ Proposed Order
- ☐ Protest
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- ☐ Report
- ☐ Request
- ☐ Request for Certification
- ☐ Request for Investigation
- ☐ Resale Agreement
- ☐ Resale Amendment
- ☐ Reservation Letter
- ☐ Response
- ☐ Response to Discovery
- ☐ Return to Petition
- ☐ Stipulation
- ☐ Subpoena
- ☐ Tariff
- ☐ Other:

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ELLIS LAWHORNE

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May 16, 2008

FILED ELECTRONICALLY
The Honorable Charles L.A. Terreni
Chief Clerk
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: Petition for Approval of Nextel South Corporation's Adoption of the Interconnection Agreement between Sprint Communications L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast, Docket No. 2007-255-C

Petition for Approval of NPCR, Inc. d/b/a Nextel Partners' Adoption of the Interconnection Agreement between Sprint Communications, L.P./Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast, Docket No. 2007-256-C

Dear Mr. Terreni:

Enclosed for filing is **Nextel's Proposed Order** in the above-referenced dockets. By copy of this letter, I am serving all parties of record and I enclose my Certificate of Service to that effect.

If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

John J. Pringle, Jr.

JJP/cr
cc: Patrick D. Turner, Esquire (via electronic and 1st class mail service)
Nannette S. Edwards, Esquire (via electronic and 1st class mail service)
William R. Atkinson, Esquire (via electronic mail service)
Mr. Joe M. Chiarelli (via electronic mail service)
Enclosures

BEFORE THE

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NOS. 2007-255-C, 2007-256-C - ORDER NO. _____

May 16, 2008

In Re: In the matter of: Petition for Approval of Nextel South Corp.'s Adoption of the Interconnection Agreement Between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS And BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast	)	NEXTEL'S PROPOSED ORDER
Consolidated with: In the matter of: Petition for Approval of NPCR, Inc. d/b/a Nextel Partners' Adoption of the Interconnection Agreement Between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS And BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast	)	

I. PROCEDURAL BACKGROUND

This matter comes before the Public Service Commission of South Carolina (the "Commission") on the separate Petitions filed on June 28, 2007 by Nextel South Corp. ("Nextel South") and NPCR, Inc. ("Nextel Partners") (collectively, "Nextel") for adoption of the interconnection agreement between Sprint Communications Company L.P. ("Sprint CLEC") and Sprint Spectrum, L.P. d/b/a Sprint PCS ("Sprint PCS") (collectively "Sprint") and BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast ("AT&T") (the "Sprint ICA"). In its Petitions, Nextel seeks to adopt the Sprint ICA pursuant to both 47 U.S.C.

Section 252(i) ("Section 252(i)") and Merger Commitment Nos. 1 and 2 under the heading "Reducing Transaction Costs Associated with Interconnection Agreements" found in Appendix F of the Federal Communications Commission's ("FCC") AT&T-BellSouth Merger Order.[1] The Commission established Docket No. 2007-255-C to address the petition for approval of Nextel South and Docket No. 2007-256-C to address the petition for approval of Nextel Partners.

On August 10, 2007, AT&T filed a Motion to Dismiss and, In the Alternative, Answer ("Motion/Answer") in each docket, and Nextel filed its Response to the Motion/Answer on August 20, 2007. The Commission held AT&T's Motion to Dismiss in abeyance and ordered the parties to proceed with the hearing on the merits of the case "in order to make a fully reasoned determination in this case."[2] On September 12, 2007, Nextel filed a Motion to Consolidate. On October 9, 2007, the Commission consolidated the proceedings for consideration and resolution. Thereafter, between October 16, 2007 and November 13, 2007, testimony was filed by Nextel witness Mark G. Felton and AT&T witness P.L. (Scot) Ferguson.

On December 7, 2007, in the separately pending arbitration Docket No. 2007-215-C proceeding between Sprint and AT&T regarding the extension of the Sprint ICA, Sprint and AT&T filed a Joint Motion for approval of an amendment to the Sprint ICA that extended the term of the

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1 *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, at Appendix F, p. 149, "Reducing Transaction Costs Associated with Interconnection Agreements" ¶ 1 and 2, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("*Merger Order*").

2 *See* Order Holding Motion to Dismiss in Abeyance, Order No. 2007-622 in Docket Nos. 2007-255-C and 2007-256-C (September 13, 2007).

Sprint ICA for a period of three years as originally requested by Sprint.[3] On January 23, 2008, the Commission approved the amendment to the Sprint ICA which in fact extended the then-effective month-to-month term of the Sprint ICA for three years from March 20, 2007 to March 19, 2010 and closed the Sprint-AT&T Arbitration Docket No. 2007-215-C.[4]

On February 8, 2008, Nextel and AT&T filed a Joint Procedural Motion (the "Joint Motion"), requesting that the Commission allow the parties to brief and argue the issues presented in the consolidated Dockets in lieu of holding an evidentiary hearing. On February 20, 2008, the Commission entered its Order on Procedural Motion[5] granting the Joint Motion and ruled that it will decide the issues presented in these consolidated dockets on the basis of the identified Formal Record. The Formal Record includes the parties' filed Stipulations of Fact, each party's respectively filed pleadings and exhibits, the testimony and exhibits the parties have prefiled in these consolidated dockets, the interconnection agreement for which Nextel seeks adoption, and such publicly available information of which the Commission appropriately may take notice pursuant to applicable statutes, rules or regulations.

Oral Arguments in this matter were held on April 9, 2008. Sprint was represented by John J. Pringle, Jr., Esquire, and William. R.L. Atkinson, Esquire. AT&T was represented by Patrick W. Turner, Esquire and John T. Tyler, Esquire. The Office of Regulatory Staff ("ORS") was

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3 *See* "Joint Motion to Approve Amendment", Sprint-AT&T Arbitration Docket No. 2007-215-C, ¶2 (Dec. 7, 2007) ("*Joint Motion*").

4 "Order Approving Amendment to Interconnection Agreement", Order No. 2008-27 in Docket No. 2007-215-C (January 23, 2008).

5 *See* Order on Procedural Motion, Order No. 2008-120 in Docket Nos. 2007-255-C and 2007-256-C

represented by Nanette Edwards, Esquire. The Commission gave the parties the opportunity to submit Proposed Orders. We have carefully reviewed these submissions, the evidence of record as stipulated by the parties, and the controlling law, and this Order sets forth our rulings on AT&T's Motion to Dismiss, and the request Nextel submitted in its Petitions.

II. LEGAL STANDARDS UNDER THE FEDERAL TELECOMMUNICATIONS ACT OF 1996

Section 252(i) states:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 C.F.R. § 51.809 implementing Section 252(i) states:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.
>
> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
> (1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
> (2) The provision of a particular agreement to the requesting carrier is not technically feasible.

(February 20, 2008).

(c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(h) of the Act.

III. DISCUSSION

AT&T SOUTH CAROLINA'S MOTION TO DISMISS

AT&T argues[6] that the Federal Communications Commission ("FCC") has exclusive jurisdiction over the merger commitments adopted and approved by the FCC in the Merger Order. Specifically, AT&T asserts that "the question of whether these federal merger commitments (that were presented to and approved by the FCC) support Nextel's claims is a question that is within the exclusive jurisdiction of the FCC."[7] We disagree, and our previous ruling on the topic in Docket No. 2007-215-C makes clear that the Commission has concurrent jurisdiction with the FCC over the Merger Commitments.[8] However, as set out below, although we believe, as did the Kentucky Public Service Commission[9], that approval of Nextel's adoption requests would be appropriate under the Merger Commitment No. 1, we need not reach a

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[6] AT&T withdrew two additional arguments contained in its filed Motion to Dismiss. *See* Ferguson Direct at p. 18, ll. 7-17, and statement of John Tyler at Oral Argument, Tr. At page 60.

[7] Motion/Answer, Page 3.

[8] *See* "Order Ruling on Arbitration", Order No. 2007-683 in Docket No. 2007-215-C (October 5, 2007).

[9] *See In the Matter of Adoption by Nextel West Corp. of the Existing Interconnection Agreement by and between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P.* and *In the Matter of Adoption by NPCR, Inc. d/b/a Nextel Partners of the Existing Interconnection Agreement by and between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P.*, Orders issued December 18, 2007, Case Nos. 2007-00255 and 2007-00256 (granting Nextel's requests to adopt the Sprint-BellSouth ICA and denying AT&T's Motions to Dismiss) (the "Kentucky Adoption Order"); Kentucky Public Service Commission Orders issued February 18, 2008, Case Nos. 2007-00255 and 2007-00256 (denying AT&T Kentucky's Motions for Reconsideration in which it raised the argument that Nextel could not adopt these agreements because AT&T would incur additional costs see discussion infra at p.25) (the "Kentucky

determination as to the specific effect of the Merger Commitments in these dockets due to our finding that Section 252(i) mandates the relief sought by Nextel. AT&T's Motion to Dismiss is therefore denied.

ADOPTION OF THE SPRINT AGREEMENT UNDER SECTION 252(i) AND 47 C.F.R. § 51.809(a)

Nextel asserts that approval of its adoption of the Sprint ICA is appropriate under Section 252(i) and 47 C.F.R. § 51.809(a). Section 252(i) states:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 C.F.R. § 51.809 implementing Section 252(i) states:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.

AT&T is a "local exchange carrier" and an "incumbent LEC" as those terms are used in Section 252(i) and 47 C.F.R. § 51.809(a). The Sprint ICA has been approved by the Commission pursuant to Section 252(i) of the federal Act. Furthermore, the parties do not dispute that each of the Nextel entities is a "requesting telecommunications carrier" under these provisions.

Reconsideration Order").

AT&T contends Nextel is not seeking to adopt the Sprint ICA under the "upon the same terms and conditions" pursuant to Section 252(i) because the Sprint ICA "addresses a unique mix of wireline and wireless items" and Nextel "provides only wireless services".[10] AT&T claims that the Sprint ICA "reflects the outcome of gives and takes that would not have been made if the agreement addressed only wireline services or only wireless services" and, cites to the bill-and-keep arrangement within the Sprint ICA.[11] AT&T further claims that allowing Nextel to adopt the Sprint ICA "would disrupt the dynamics" of the terms and conditions in the Sprint ICA to result in AT&T "los[ing] the benefits of the bargain" that it had negotiated with Sprint CLEC and Sprint PCS, and then cites to three provisions of the Sprint ICA that Mr. Ferguson believes would be "unusual" for AT&T to agree to with a "stand-alone wireless" or "stand-alone CLEC" carrier.[12]

AT&T's position is that Nextel is a stand-alone wireless carrier that is not in the same position to AT&T as were Sprint CLEC and Sprint PCS when they negotiated the Sprint ICA.[13] Regardless of how AT&T has attempted to couch its argument, it is attempting to require Nextel to be "similarly situated" before it can adopt the Sprint ICA. AT&T's attempt to limit Nextel's adoption of the Sprint ICA is contrary to the express provisions of 47 C.F.R. § 51.809(a), and is a discriminatory practice that has been rejected by not only the FCC and the Courts, but also the Kentucky PSC in the context of Nextel's request to adopt the Sprint ICA.

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10 *Ferguson Direct* at p. 9, l. 22 – p.10, l. 2; p. 12, l. 5-8.
11 *Id.* at p. 13, l. 6-11.
12 *Id.* at p. 13, l. 13 – p. 14, l. 20.

47 C.F.R. § 51.809(a) states:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. *An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.* [Emphasis added].

In July of 2004, the FCC revisited its interpretation of Section 252(i) to reconsider and eliminate what was originally known as its "pick-and-choose" rule, which permitted requesting carriers to select only the related terms that they desired from an incumbent LEC's existing filed interconnection agreements, rather than an entire interconnection agreement. The FCC eliminated the "pick-and-choose" rule and replaced it with the "all-or-nothing" rule. The FCC concluded that the original purpose of Section 252(i), protecting requesting carriers from discrimination, continued to be served by the all-or nothing rule:

> We conclude that under an all-or-nothing rule, requesting carriers will be protected from discrimination, as intended by section 252(i). *Specifically, an incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers.* If the agreement includes terms that materially benefit the preferred carrier, other requesting carriers will likely have an incentive to adopt that agreement to gain the benefit of the incumbent LEC's discriminatory bargain. Because these agreements will be available on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.[14]

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[13] *See Ferguson Surrebuttal* at p. 3, l. 3-14.

[14] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No.01-338, Second Report and Order, 19 FCC Rcd, 13494 at ¶ 19 (2004) ("*Second Report and Order*").

The FCC recognizes that the primary purpose of the Section 252(i) adoption process has been to ensure that an ILEC does not discriminate in favor of any particular carriers,[15] and that a carrier seeking to adopt an existing ICA under Section 252(i) "shall be permitted to obtain its statutory rights on an expedited basis."[16] Where a LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the Commission that such differential treatment is justified - which as set out below AT&T has not attempted to do. The fact a carrier serves a different class of customers, or provides a different type of service, does not bear a direct relationship with the costs incurred by the LEC to interconnect with that carrier or on whether interconnection is technically feasible.[17]

As set forth in the FCC's *Second Report and Order*, AT&T's pre-merger parent, BellSouth Corporation, contended that incumbent LECs should be permitted to restrict Section 252(i) adoptions to "similarly situated" carriers.[18] In explaining its risks associated with the "pick and choose" rule in the context of a potential bill-and-keep scenario, BellSouth stated that if it agreed to bill-and-keep and "construct[s] contract language specific to this situation, *there is still risk that CLECs who are not similarly situated will argue they should be allowed to adopt the language, or parts thereof.*"[19] (Emphasis Added). The scenario contemplated a CLEC with a very specific business plan, customer

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15 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd, 15499, 16139 at ¶ 1315 (1996) ("*Local Competition Order*").

16 *Id.* at ¶ 1321.

17 *Id.* at ¶ 1318.

18 *Second Report and Order* at ¶ 30 and n. 101.

19 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,*

base and bill and keep provisions that BellSouth contended in other circumstances would be extremely costly to BellSouth.[20] Notwithstanding such assertions, the FCC held:

> We also reject the contention of at least one commentator that incumbent LECs should be permitted to restrict adoptions to "similarly situated" carriers. We conclude that section 252(i) does not permit incumbent LECs to limit the availability of an agreement in its entirety only to those requesting carriers serving a comparable class of subscribers or providing the same service as the original party to the agreement. Subject to the limitations in our rules, the requesting carrier may choose to initiate negotiations or to adopt an agreement in its entirety *that the requesting carrier deems appropriate for its business needs*. Because the all-or-nothing rule should be more easily administered and enforced than the current rule, we do not believe that further clarifications are warranted at this time.[21]

Subsequent to the *Second Report and Order* AT&T's other predecessor, SBC, attempted another "similarly situated" argument in an effort to avoid filing and making available in its entirety all of the terms of an agreement it had entered into with a CLEC named Sage Telecom.[22] In *Sage*, SBC and Sage Telecom entered into a "Local Wholesale Complete Agreement" ("LWC") that included not only products and services subject to the requirements of the federal Act, but also certain products and services that were not governed by either Section 251 or Section 252. Following the parties' press release and filing of only that portion of the LWC that SBC and Sage considered to be specifically required under Section 251 of the Act, other CLECs filed a petition requiring the filing of the entire LWC. The Texas Commission found the LWC was an integrated

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CC Docket No.01-338, BellSouth Affidavit of Jerry D. Hendrix at ¶ 6 (May 11, 2004)

20 *Id.*

21 *Second Report and Order* at ¶ 30 (emphasis added).

22 *Sage Telecom, L.P. v. Public Utility Commission of Texas,* 2004 U.S. Dist. LEXIS 28357 (W.D. Tex.) (*"Sage"*)

agreement resulting in the entire agreement being an interconnection agreement subject to filing and thereby being made available for adoption by other CLECs pursuant to 252(i).

On appeal, SBC argued that "requiring it to make the terms of the entire LWC agreement with Sage available to all CLECs is problematic because there are certain terms contained in it, which for practical reasons, it could not possibly make available to all CLECs."[23] The federal district court rejected this argument stating:

> [SBC's] argument proves too much. The obligation to make all the terms and conditions of an interconnection agreement to any requesting CLEC follows plainly from § 252(i) and the FCC's all-or-nothing rule interpreting it. The statute imposes the obligation for the very reason that its goal is to discourage ILECs from offering more favorable terms only to certain preferred CLECs. SBC's and Sage's appeal to the need to encourage creative deal-making in the telecommunications industry simply does not show why specialized treatment for a particular CLEC such as Sage is either necessary or appropriate in light of the Act's policy favoring nondiscrimination.[24]

In Kentucky, AT&T opposed Nextel's adoption of the Sprint ICA under Section 252(i) based on almost identical grounds as exist in this proceeding.[25] As in this case, AT&T asserted in Kentucky that:

- because Nextel is only a wireless carrier, it could not avail itself of the network elements provided within the Sprint ICA that AT&T negotiated with both Sprint's wireless and wireline entities;

- because of this "unique" mix, the Sprint ICA "reflects the outcome of negotiated gives and takes that would not have been made if the agreement addressed only wireline service or wireless service";

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23 *Id.* at *23.

24 *Id.* at **23-24.

25 Unlike Kentucky, where AT&T asserted an objection based on 47 C.F.R. § 51.809(b)(1), as set out below, neither AT&T's pleadings, nor Mr. Ferguson's testimony asserted any objection based on 51.809(b)(1).

- the terms of the Sprint ICA apply only to an entity that provides both wireless and wireline service;

- AT&T rarely enters into an interconnection agreement addressing both wireline and wireless services; and,

- Allowing Nextel to adopt the Sprint ICA would "disrupt the dynamics of terms and conditions [and AT&T] would lose the benefits of the bargain negotiated with those parties", citing the Attachment 3, Section 6.1. bill-and-keep arrangements.[26]

The Kentucky PSC (like the FCC) recognized that the method for adopting an interconnection agreement is intended to be simple and expedient. Accordingly, the Kentucky PSC found that AT&T's argument is "antithetical to the very purpose of Section 252(i), which is to allow telecommunications providers to enter into interconnection agreements on the same footing as each other", and the "all-or-nothing" rule was clearly intended to prohibit this kind of discrimination:[27]

> AT&T cannot play favorites in a market and determine which businesses succeed and which fail by offering more advantageous terms to one party and lesser terms to another. If AT&T can prevent Nextel, or any requesting carrier, from adopting the Sprint ICA or any other interconnection agreement by simply asserting that some of the provisions of the interconnection agreement cannot apply to the requesting carrier, then the very purpose of the all-or-nothing rule is thwarted. Most requesting carriers' business plans or structures differ from one another, and, therefore, it would be difficult to comprehend a situation in which any requesting carrier could adopt an interconnection agreement and have all of the provisions apply to it. If AT&T Kentucky's argument is to be believed, then it would result in changing almost every adoption proceeding into an arbitration.[28]

Based on the FCC's *Second Report and Order*, *Sage* and the *Kentucky Reconsideration Order*, we conclude that AT&T cannot prevent Nextel's adoption of the Sprint ICA based on

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26 *Kentucky Reconsideration Order* at p. 6-7.

27 *Id.* at p. 13.

assertions that Nextel is a stand-alone wireless carrier that may not use all of the provisions of the Sprint ICA. Similarly, these rulings construing the FCC's all-or-nothing Section 252(i) rule demonstrate that AT&T's contention that it entered into an "unusual" agreement it would not ordinarily enter into with a wireless or wireline carrier on a stand-alone basis actually supports the approval of Nextel's adoption of the Sprint ICA.

AT&T makes a similar argument that Nextel cannot adopt the Sprint ICA under Section 252(i) because it is a stand-alone wireless carrier, based on the premise that the Sprint ICA *requires* both a wireless party and a wireline party to the agreement for it to be an effective agreement. AT&T has not cited to any provision of the agreement that *requires* the presence of both a wireless and wireline entity—and we can find no such provision. Indeed, Attachment 3, § 6.1 demonstrates that both Sprint entities are not required to remain as parties to the Sprint ICA for it to remain an effective agreement.

In discussing "gives and takes", Mr. Ferguson states "Attachment 3, Section 6.1 of the Sprint ICA, for instance, expressly states that "The Parties' agreement to establish a bill-and-keep compensation arrangement was based upon extensive evaluation of costs incurred by each party for the termination of traffic."[29] What the balance of Section 6.1 goes on to make clear, however, is that either Sprint entity can actually opt out of the Sprint ICA into another agreement under Section 252(i) and the Sprint ICA would continue as to the remaining Sprint entity – therefore, the presence of "both" Sprint entities is not required in order for only "one" Sprint entity to operate under the

28 *Id.* at p. 14.

agreement in the absence of the other. Additionally, the bill and keep provisions would also continue as long as the Sprint entity that opted out of the Sprint ICA did not opt into another agreement that required AT&T to pay reciprocal compensation. Attachment 3, Section 6.1 of the Sprint ICA, in its entirety, states:

> Compensation for Call Transport and Termination for CLEC Local Traffic, ISP-Bound Traffic and Wireless Traffic is the result of negotiation and compromise between BellSouth, Sprint CLEC and Sprint PCS. The Parties' agreement to establish a bill and keep compensation arrangement was based upon extensive evaluation of costs incurred by each party for the termination of traffic. *Specifically, Sprint PCS provided BellSouth a substantial cost study supporting its costs. As such the bill and keep arrangement is contingent upon the agreement by all three Parties to adhere to bill and keep. Should either Sprint CLEC or Sprint PCS opt into another interconnection arrangement with BellSouth pursuant to 252(i) of the Act which calls for reciprocal compensation, the bill and keep arrangement between BellSouth and the remaining Sprint entity shall be subject to termination or renegotiation as deemed appropriate by BellSouth.* [Emphasis added].

The clear and unambiguous language of the Sprint ICA demonstrates two things. First, AT&T (then BellSouth) entered into the bill and keep arrangement out of concern *over additional Sprint PCS cost-study supported charges to terminate AT&T originated traffic,* not any increase in cost to AT&T to provide termination services to Sprint PCS or Sprint CLEC.[30] As discussed below, AT&T has not contended that AT&T will incur any additional costs to provide the exact same AT&T services to Nextel over its cost to provide such services to Sprint.

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29 *Ferguson Direct* at p. 13, l. 6-11.

30 *See In Re: Petition by Sprint PCS for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Pursuant to Section 252 of the Communications Act*, Florida Public Service Commission, Docket No. 000761-TP (filed June 23, 2000). Sprint PCS had produced a cost study in the Florida Public Service Commission arbitration to demonstrate that its costs of termination significantly exceeded those of BellSouth. It is the Florida cost study that is referenced in paragraph 6.1 of the Sprint ICA.

Second, the Sprint ICA provides that either of the Sprint entities is free to opt out of the Sprint ICA and into any other AT&T agreement under Section 252(i) at any time, and the remaining Sprint entity can continue to operate under the Sprint ICA. Additionally, if for example, Sprint CLEC opted into a stand-alone AT&T CLEC agreement, the existing bill-and-keep arrangement with Sprint PCS *continues* under the Sprint ICA. Thus, there simply is no affirmative requirement that both a wireline and wireless Sprint entity remain joint parties to the Sprint ICA throughout the duration of the agreement. Therefore, AT&T's argument that the Sprint ICA requires both a wireline and wireless carrier at the table is, as a matter of law, contrary to the express unambiguous terms of the Sprint ICA.

AT&T claims that what Nextel seeks to do is not an "adoption" under Section 252(i). We disagree. As discussed herein, we see no impediment to Nextel's adoption of the Sprint ICA. Nextel seeks to operate under the agreement just as Sprint PCS is currently operating under the agreement. The Sprint ICA does not require both a wireline and a wireless carrier. AT&T's argument is just a restatement of its claim that Nextel is not "similarly situated" to the parties to the Sprint ICA, and does not provide a basis to refuse adoption under Section 252(i) of the federal Act.

Further, to the extent that AT&T had even *attempted* to include a non-cost based two-Sprint wireless and wireline entity *requirement* within the Sprint ICA, such a requirement would constitute an unenforceable, discriminatory "poison pill" provision contrary to federal law. As it did in its

Local Competition Order, the FCC also recognized in the *Second Report and Order* our obligation as a reviewing state commission to detect and prevent the occurrence of discrimination not only when an interconnection agreement is initially approved under Section 252(e), but when deciding the appropriateness of a Section 252(i) adoption. In particular, absent the applicability of a 47 C.F.R. §51.809(b) exception (of which AT&T admits no such exception is present in this case), AT&T must make the Sprint ICA available in its entirety at the election of a requesting carrier, and AT&T cannot insist upon specific provisions in an agreement as a means to prevent subsequent carriers from requesting an existing ILEC interconnection agreement. The FCC has stated:

> To the extent that carriers attempt to engage in discrimination, such as including ***poison pills*** in agreements, we expect state commissions, in the first instance, will detect such discriminatory practices in the review and approval process under section 252(e)(1). Discrimination provisions include, but are not limited to, such things as inserting an onerous provision into an agreement when the provision has no reasonable relationship to the requesting carrier's operation. ***We would also deem an incumbent LEC's conduct to be discriminatory if it denied a requesting carrier's request to adopt an agreement to which it is entitled under section 252(i) and our all-or-nothing rule***.[31] [Emphasis added].
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> "Poison pills" are onerous provisions that could be included in an interconnection agreement, which would not negatively affect the original requesting carrier, but would discourage other carriers from subsequently adopting the agreement.[32]
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> ***

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31 *Second Report and Order.* at ¶ 29.

32 *Id.* at n. 17 (citing *Local Competition Order* at ¶ 1312) ("We also find that practical concerns support our interpretation. As observed by AT&T and others, failure to make provisions available on an unbundled basis could encourage an incumbent LEC to insert into its agreement onerous terms for a service or element that the original carrier *does not need*, in order to discourage subsequent carriers from making a request under that agreement.") (emphasis added).

> We conclude that under an all-or-nothing rule, requesting carriers will be protected from discrimination, as intended by section 252(i). Specifically, an incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers. If the agreement includes terms that materially benefit the preferred carrier, other requesting carriers will likely have an incentive to adopt that agreement to gain the benefit of the incumbent LEC's discriminatory bargain. Because these agreements will be available on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.[33]

Like the FCC and the Kentucky Commission, we believe that the adoption process should be simple and expedient, and we reject AT&T's arguments because of the clear prohibition against discriminatory practices found in Section 252(i).

AT&T further argues that Nextel's adoption of the Sprint ICA could be internally inconsistent and appear to violate the FCC's *TRRO* prohibition against using unbundled network elements ("UNEs") for the exclusive provision of mobile wireless service. By virtue of the April, 2006 *TRRO Amendment* to the Sprint ICA, Sprint and AT&T completely replaced Attachment 2 regarding the provisioning of UNEs (which are short-hand referenced in Attachment 2 as "Network Elements", *see* Attachment 2, § 1.1).[34] As a result of that Amendment, Attachment 2, § 1.5 specifically prohibits both Sprint CLEC and Sprint PCS from obtaining UNEs for wireless only purposes, expressly stating: "Sprint shall not obtain a Network Element for the exclusive provision of mobile wireless services or interexchange services." Thus, consistent with the *TRRO*, just as the

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33 *Id.* at ¶ 19.

34 *See* Sprint ICA at pages "CCCS 873 of 1169"-"CCCS 1165 of 1169" and *Ferguson Direct* Exhibit PLF-5 which reflects pages "CCS 873 of 1169"-"CCCS 882 of 1169" of the April, 2006 *TRRO Amendment.*

Sprint ICA already precludes *either* Sprint CLEC or Sprint PCS from obtaining UNEs for the exclusive use of Sprint PCS wireless-only services, the Sprint ICA would likewise preclude Nextel from obtaining UNEs for such Nextel wireless-only purposes. There simply is no dispute between the parties regarding the unavailability of UNEs for the exclusive provision of wireless service under the Sprint ICA.[35] Therefore, AT&T's position does not provide a basis for the Commission to deny Nextel's request under Section 252(i).

THE APPLICATION OF 47 C.F.R. SECTION 51.809(b)

In order to refuse Nextel's request to adopt the Sprint ICA, AT&T must prove to the Commission that one of the subparts of 47 C.F.R. § 51.809(b) applies. That provision states that:

(b) the obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:

(1) the costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or

(2) the provision of a particular agreement to the requesting carrier is not technically feasible.

AT&T's submissions to the Commission contain no allegation or inference that providing the Sprint ICA to Nextel is "not technically feasible." Therefore AT&T cannot refuse to make the Sprint ICA available based upon 47 C.F.R. § 51.809(b)(2).

Likewise, AT&T's pleadings and testimony contain no allegation or evidence that pursuant to 47 C.F.R. § 51.809(b)(1) its costs of providing the Sprint ICA to Nextel are greater than the costs of

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35 *Felton Rebuttal* at p. 11, l. 13 - p. 12, line 3.

providing that agreement to the Sprint entities. Counsel for AT&T affirmatively conceded at Oral Argument that AT&T had not undertaken the cost analysis required by the rule: "we do not have on the record anything regarding specific costs in your state." Oral Argument Tr., at Page 69. Therefore, AT&T has failed to satisfy its burden under 47 C.F.R. § 51.809(b)(1).

The Commission is mindful of the arguments contained in AT&T's Brief that allowing Nextel's adoption of the Sprint ICA may "make AT&T South Carolina's costs of providing the Sprint ICA to such adopting carriers greater than AT&T South Carolina's costs of providing the Sprint ICA to the original parties to that agreement." (AT&T Brief at Page 9). However, AT&T's legal arguments, without factual and evidentiary proof of higher costs, cannot form a basis for a ruling from this Commission that AT&T has met its burden of proof under 47 C.F.R. § 51.809(b)(1). *See, e.g. Eddy v. Waffle House*, 482 F.3d 674 (4th Cir.) 2007. Moreover, even if the Commission could consider AT&T's argument as evidence, the rule requires that AT&T prove that its costs for providing the Sprint ICA agreement *to Nextel* are higher. By contrast, AT&T argues that its costs of providing the Sprint ICA to those carriers it speculates might adopt the Sprint ICA (not Nextel) would be higher. AT&T's argument does not address its costs of providing the Sprint ICA to Nextel, and could not satisfy the plain language of 47 C.F.R. § 51.809(b)(1) even had it been supported by evidence.

For the foregoing reasons, the Commission adopts Nextel's positions and requires AT&T to execute Nextel's proposed adoption Amendment pursuant to Section 252(i).

NEXTEL'S ADOPTION OF SPRINT AGREEMENT PURSUANT TO AT&T MERGER COMMITMENTS 1 AND 2

There is no substantive distinction between AT&T's position in these consolidated dockets that the FCC has "exclusive jurisdiction" to address Nextel's adoption of the Sprint ICA under the Merger Commitments, and AT&T's position in Docket No. 2007-215-C that the FCC had "sole jurisdiction" to address Sprint's extension of the Sprint ICA under the Merger Commitments.

For the reasons already extensively briefed by Sprint in Docket No. 2007-215-C and Nextel in these consolidated dockets, and the Commission's finding of concurrent jurisdiction in Docket No. 2007-215-C (and as held by several state Commissions), the Commission also clearly has jurisdiction over Nextel's petition to approve an adoption of the Sprint ICA pursuant to Merger Commitment Nos. 1 and 2.[36]

As stated earlier in this Order, we need not reach a determination as to the specific effect of

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[36] AT&T Merger Commitment 1 under the heading, "Reducing Transaction Costs Associated with Interconnection Agreements" in Appendix F of the AT&T Merger Order, reads as follows:

> The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made.

AT&T Merger Commitment 2 under the heading, "Reducing Transaction Costs Associated with Interconnection Agreements" in Appendix F of the AT&T Merger Order, reads as follows:

> The AT&T/BellSouth ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the ground that the agreement has not been amended to reflect changes of law, provided the requesting telecommunications carrier agrees to negotiate in good faith an amendment regarding such change of law immediately after it has opted into the agreement.

the Merger Commitments in these dockets due to our finding that Section 252(i) mandates the relief sought by Nextel. However, we believe, as did the Kentucky Public Service Commission, that approval of Nextel's adoption requests would be appropriate under either Section 252(i) or Merger Commitment Nos. 1. and 2. As the Kentucky Commission stated in its recent Order on reconsideration in the Kentucky Nextel adoption dockets:

> Although Nextel can adopt the Sprint ICA pursuant to the merger commitments, as discussed below, Nextel can adopt the Sprint ICA pursuant to 47 U.S.C. Section 252(i), independently of the merger commitments, and, therefore, any objections pertaining to adoption under the merger commitments is moot.[37]

Further, the Commission finds the arguments of Nextel in its February 28, 2008 Brief in this docket pertaining to approval of Nextel's requests under the Merger Commitments to be persuasive.[38] Applying the plain and ordinary meaning of the words used to establish such Commitments, it is indisputable that:

- Nextel is within the group of "any requesting telecommunications carrier;"
- Nextel has requested the Sprint ICA;
- The Sprint ICA is within the group of "any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory," having been entered into by Sprint and AT&T in all 9 legacy BellSouth states;
- The Sprint ICA already has state-specific pricing and performance plans incorporated into it by the state;

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37 Kentucky Reconsideration Order, at 10-11.

38 *See* Nextel's February 28, 2008 Brief, at pages pp. 24-29.

- There is no issue of technical feasibility; and,
- The Sprint ICA has already been amended to reflect changes of law, i.e. the TRRO requirements.

For the foregoing reasons, the Commission believes that approval of the Nextel Petition to adopt the Sprint ICA is also consistent with the promises made by, and which became legal commitments of, AT&T pursuant to Merger Commitment Nos. 1 and 2.

IV. CONCLUSION

We find that Nextel's request for this Commission to approve Nextel's adoption of the Sprint-AT&T agreement is, on multiple, yet independent bases, consistent with federal law. Accordingly, for all the reasons stated herein, we grant the relief requested in Nextel's adoption Petitions.

IT IS THEREFORE ORDERED THAT:

a. AT&T's Motion to dismiss Nextel's Petitions is denied;

b. The relief requested in Nextel's Petitions is granted as described herein, and AT&T shall execute and the Parties shall file within ten days of the date of this Order the adoption Agreement that is either in the form attached to Nextel's Petition (as contained in Exhibit B thereto) or the form similar to that used by the parties in Kentucky, but in either event, with an effective date the same day as Nextel's adoption request of May 18, 2007.

c. This Order shall remain in full force and effect until further Order of the Commission.

IT IS SO ORDERED.

BY ORDER OF THE COMMISSION:

G. O'Neal Hamilton, Chairman

ATTEST:

C. Robert Moseley, Vice-Chairman

(SEAL)

BEFORE THE
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
DOCKET NOS. 2007-255-C, 2007-256-C - ORDER NO. _____
May 16, 2008

In Re:
In the matter of:)
)
Petition for Approval of Nextel South)
Corp.'s Adoption of the Interconnection)
Agreement Between Sprint) NEXTEL'S PROPOSED ORDER
Communications Company L.P., Sprint)
Spectrum L.P. d/b/a Sprint PCS And)
BellSouth Telecommunications, Inc.)
d/b/a AT&T South Carolina d/b/a)
AT&T Southeast

Consolidated with:

In the matter of:)
)
Petition for Approval of NPCR, Inc.)
d/b/a Nextel Partners' Adoption of the)
Interconnection Agreement Between)
Sprint Communications Company L.P.,)
Sprint Spectrum L.P. d/b/a Sprint PCS)
And BellSouth Telecommunications,)
Inc. d/b/a AT&T South Carolina d/b/a)
AT&T Southeast

This is to certify that I have caused to be served this day, one (1) copy of **Nextel's Proposed Order** by placing a copy of same in the care and custody of the United States Postal Service (unless otherwise specified), with proper first-class postage affixed hereto and addressed as follows:

Patrick W. Turner, Esquire
AT&T South Carolina
1600 Williams Street
Suite 5200
Columbia SC 29201

Lisa Gambrell
Paralegal

May 16, 2008
Columbia, South Carolina